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Supreme Court of the United States

GEORGE QUINONES,
Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether New York's discretionary persistent felony offender statute, which permits a sentence above the otherwise-applicable statutory maximum upon a judge's determination, after an evidentiary hearing, of facts not found by a jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the New York State Court of Appeals were Petitioner George Quinones and Respondent the People of the State of New York.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 4

STATEMENT OF FACTS 5

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION BELOW CONFLICTS WITH STATE AND FEDERAL DECISIONS CONCERNING THE APPLICABILITY OF *APPRENDI* TO INCREASED MAXIMUM SENTENCES BASED ON "DISCRETIONARY" FINDINGS BY JUDGES 9

A. There Is An Irreconcilable And Entrenched Conflict That Requires This Court's Attention 9

B. The Split Within The Second Circuit Makes Resolution Of The Conflict Particularly Pressing 16

II. THE DECISION BELOW IS CONTRARY TO THIS COURT'S HOLDINGS IN *APPRENDI*, *BLAKELY*, AND *CUNNINGHAM* 18

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) 6, 9, 11, 19, 22
Blakely v. Washington, 542 U.S. 296 (2004) 5, 6, 18, 20, 22
Brown v. White, No. 06-00496, 2007 WL 1977277 (D. Haw. July 3, 2007) 16
Cunningham v. California, 549 U.S. 270 (2007) 4, 18, 20, 21, 22
Daniels v. Conway, No. 06 Civ. 11457, 2009 WL 466804 (S.D.N.Y. Jan. 15, 2009) 17
Kamana'o v. Peyton, No. 05-00681, 2006 WL 1775869 (D. Haw. June 21, 2006) 16
Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006).. 15, 16
Keck v. Luna, No. 06-00571, 2007 WL 2263060 (D. Haw. Aug. 7, 2007) 16
Lanosa v. Frank, No. 07-00115, 2007 WL 2746839 (D. Haw. Sept. 17, 2007), *aff'd*, 304 F. App'x 565 (9th Cir. 2008) 16
Mincey v. Arizona, 437 U.S. 385 (1978) 17
Morris v. Artus, No. 06 Civ. 4095, 2007 WL 2200699 (S.D.N.Y. July 30, 2007) 17
Portalatin v. Graham, 478 F. Supp. 2d 385 (E.D.N.Y. 2007) 17
PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) 18
Ring v. Arizona, 536 U.S. 584 (2002) 6, 20, 22
United States v. Booker, 543 U.S. 220 (2005) 6
Washington v. Poole, 507 F. Supp. 2d 342 (S.D.N.Y. 2007) 17, 22, 24

TABLE OF AUTHORITIES
(continued)

Page

State Cases

People v. Bazemore, 52 A.D.3d 727, 860 N.Y.S.2d 602 (2d Dep't 2008) 23
People v. Bingham, 24 A.D.3d 1016, 806 N.Y.S.2d 768 (3d Dep't 2005) 23
People v. Black, 113 P.3d 534 (Cal. 2005) 18
People v. Murdaugh, 38 A.D.3d 918, 833 N.Y.S.2d 557 (2d Dep't 2007) 23
People v. Rivera, 60 A.D.3d 788, 875 N.Y.S.2d 173 (2d Dep't 2009) 23
People v. Rivera, 833 N.E.2d 194 (N.Y. 2005) 8, 20, 21, 22, 23
People v. Rosen, 752 N.E.2d 844 (N.Y. 2001) 8, 21, 22
People v. Ruffins, 6 A.D.3d 1153, 776 N.Y.S.2d 405 (4th Dep't 2004) 23
State v. Bell, 931 A.2d 198 (Conn. 2007) 10, 11
State v. Fairbanks, 688 N.W.2d 333 (Minn. Ct. App. 2004), *rev. granted* (Minn. Jan. 20, 2005), *rev. denied* (Minn. Dec. 13, 2005) 13, 14
State v. Foster, 845 N.E.2d 470 (Ohio 2006) 12, 13
State v. Frawley, 172 P.3d 144 (N.M. 2007) 15
State v. Gomez, 239 S.W.3d 733 (Tenn. 2007) 15
State v. Kendall, 723 N.W.2d 597 (Minn. 2006) 14
State v. Lewis, 590 A.2d 149 (Me. 1991) 11
State v. Maugaotega, 168 P.3d 562 (Haw. 2007) 14, 15
State v. Price, 171 P.3d 1223 (Ariz. 2007) 15
State v. Schofield, 895 A.2d 927 (Me. 2005) 11, 12
State v. White, 129 P.3d 1107 (Haw. 2006) 16

TABLE OF AUTHORITIES
(continued)

Page

Federal Statutes
28 U.S.C. § 1257(a) 1

State Statutes
CONN. GEN. STAT. § 53a-40 (2007) 10
HAW. REV. STAT. § 706-662(4)(2004) 14
ME. REV. STAT. ANN. tit. 17-A,
§ 1252(2)(A)(2001) 12
MINN. STAT. § 609.1095, subd. 2 (2002) 13
MINN. STAT. § 609.1095, subd. 2 (2005) 14
N.Y. CRIM. PROC. LAW § 400.20 ..... 2, 6, 19, 22
N.Y. PENAL LAW § 70.10 ..... *passim*
OHIO REV. CODE § 2929.14(D)(2)(b)(1996) 12

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-18a) is reported at ___ N.E.2d ___, 12 N.Y.3d 116 (2009). The opinion of the Supreme Court, Appellate Division, Second Department (Pet. App. 19a-20a), is reported at 45 A.D.3d 874 (2d Dep't 2007).

JURISDICTION

The Court of Appeals issued its decision on February 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 70.10 of the New York Penal Law provides, in pertinent part:

> 1. Definition of persistent felony offender. (a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.
>
> * * *
>
> 2. Authorized Sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of

> imprisonment authorized by section 70.00, 70.02, 70.04, 70.06 or subdivision five of section 70.80 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

Section 400.20 of the New York Criminal Procedure Law provides, in pertinent part:

> 1. **Applicability.** . . . Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.
>
> * * *
>
> 5. **Burden and standard of proof; evidence.** Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the

issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

* * *

9. **Cases where further hearing is required.** . . . At the conclusion of the hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted. If the court both finds that the defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.

10. **Termination of hearing.** At any time during the pendency of a hearing pursuant to this section, the court may, in its discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant may not be sentenced as a persistent felony offender.

INTRODUCTION

The decision below holds that New York State may constitutionally increase a criminal defendant's statutory maximum sentence based on a judge's finding, after an evidentiary hearing, that such an increase "will best serve the public interest" in light of "the history and character of the defendant and the nature and circumstances of his criminal conduct." That decision is flatly contrary to several decisions of this Court, and is in irreconcilable conflict with decisions of the Ninth Circuit and the highest courts of multiple states. Indeed, federal district courts in New York have begun to grant habeas relief on the ground that decisions upholding this sentencing scheme are not even *reasonable* applications of this Court's *Apprendi* cases. This Court's review is urgently needed.

Since *Apprendi*, this Court has repeatedly held that a judge may not increase a defendant's sentence beyond the statutory maximum authorized by the jury's verdict. Most recently, in *Cunningham v. California*, 549 U.S. 270 (2007), this Court expressly rejected the claim that a maximum sentence could be increased based on judicial findings that could be characterized as falling within a sentencing judge's "traditional" factfinding role. The Court reaffirmed that *all* factfinding necessary to elevate a maximum sentence "falls within the province of the jury employing a beyond-a-reasonable-doubt standard." *Id.* at 292.

The decision below leaves New York as the only state to uphold a discretionary persistent felony offender sentence enhancement against an *Apprendi* challenge. Multiple states—Connecticut, Maine,

Ohio, Minnesota, and Hawaii—have similar sentencing enhancement provisions, and *all* of them, along with the Ninth Circuit (addressing the Hawaii statute) and two New York federal district court judges, have found those provisions unconstitutional.

Unsurprisingly, in light of this overwhelming disagreement with the position taken by the New York Court of Appeals, the decision below is impossible to reconcile with this Court's *Apprendi* decisions. *Blakely*, in particular, makes clear that judicial findings cannot increase a sentence above the maximum applicable "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted). And *Cunningham* reaffirms that there is no exception to this rule for findings "'that traditionally ha[ve] been incident to the judge's selection of an appropriate sentence.'" 549 U.S. at 289 (citation omitted). The decision below is flatly inconsistent with these precedents.

For all of these reasons, this Court's review is warranted.

STATEMENT OF FACTS

Following a jury trial in New York State Supreme Court, petitioner was convicted of third-degree burglary, a Class D nonviolent felony which, in combination with petitioner's status as a prior felon, carried a maximum sentence of seven years' imprisonment. The jury acquitted petitioner of second-degree burglary, a more serious charge that would have increased the maximum sentence to 15 years.

Prior to sentencing, the State moved, pursuant to N.Y. Penal Law § 70.10 and N.Y. Criminal Procedure Law § 400.20, for petitioner to be sentenced as a discretionary persistent felony offender, which would change the applicable maximum sentence from seven years to life imprisonment (Appendix for Defendant-Appellant in *People of the State of New York v. Quinones* (N.Y. Ct. of Appeals) ("N.Y. App.") 115-117). Under New York law, a discretionary persistent felony offender sentence requires an evidentiary hearing and two predicate judicial findings, to be made in writing. Specifically, such a sentence:

> may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.

N.Y. CRIM. PROC. LAW § 400.20(1).

Petitioner argued that increasing his maximum sentence pursuant to such judge-made findings would violate *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (N.Y. App. 122-143). The court rejected petitioner's argument, concluding that it had the power, in accordance with its "exercise of broad discretion based on traditional sentencing

factors," to impose a persistent felony offender sentence (Pet. App. 28a).

At the sentencing hearing, after offering proof that petitioner had been convicted of at least two prior felonies, the prosecutor cited petitioner's alleged use of violence during crimes; his alleged history of committing crimes while on parole; and his "showing [that] he can't function in society" (N.Y. App. 164-166). Defense counsel contested the claim that petitioner was violent, as there was no indication petitioner ever had a weapon during any prior crime or that any complainant had ever suffered any injury (*id.* at 167-169). Counsel also argued that petitioner's record was not so horrendous, egregious, or offensive as to merit persistent felony offender status, particularly in light of his childhood, which was marked by instability, poverty, violence, and personal psychological issues (*id.* at 169-171).

The court found that petitioner satisfied both prerequisites, and, as required by New York law, issued a written opinion. The court found the following facts in support of its determination that the "public interest" prong was satisfied: (1) petitioner "lacks respect for people and their property, and . . . he is a menace to society"; (2) the alleged facts of some of petitioner's convictions showed a history of violent conduct; (3) petitioner "has utter disregard for the criminal justice system"; and (4) petitioner "cannot be[] rehabilitated, and . . . society is unsafe when he is not incarcerated" (Pet. App. 22a). The court imposed an enhanced sentence of 18 years to life (*id.* at 23a).

On appeal, the Appellate Division rejected petitioner's *Apprendi* claim as foreclosed by the New

York Court of Appeals's decision, over two dissents, in *People v. Rivera*, 833 N.E.2d 194 (N.Y. 2005), and its decision in *People v. Rosen*, 752 N.E.2d 844 (N.Y. 2001), both of which found that the discretionary persistent felony scheme passed constitutional muster (Pet. App. 20a).

Petitioner renewed his *Apprendi* claim before the New York Court of Appeals, arguing that in light of *Cunningham*, *Rosen* and *Rivera* were no longer good law. In an opinion dated February 24, 2009, the Court of Appeals affirmed petitioner's sentence and upheld the persistent felony offender statute (Pet. App. 1a). Despite the express statutory requirement that the sentencing judge make both predicate findings, the court characterized the first prong alone as making the defendant "eligible" for an enhanced sentence, while downplaying the second prong as the equivalent of judicial discretion to choose any sentence within the enhanced range (*Id.* at 13a).

The court further reasoned that the sentencing schemes in *Booker* and *Cunningham* "effectively provided for judicial factfinding of an element(s) of an offense," whereas the New York scheme "requires that the sentencing court make a qualitative judgment about, among other things, the defendant's criminal history and the circumstances surrounding a particular offense." (Pet. App. 17a). This "qualitative judgment," the court asserted, merely "set[s] the parameters for the performance of one of the sentencing court's most traditional and basic functions, *i.e.*, the exercise of sentencing discretion." (*Id.* at 17a-18a).

However, despite this characterization of the New York statutes as making a defendant "subject to an

enhanced sentence based solely on the existence of two prior felony convictions" (*id.* at 15a), the court did not excise the second-prong finding o in any other way indicate that sentencing courts were free to ignore this express statutory prerequisite or the procedural requirements—such as a hearing and written findings—accompanying it.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH STATE AND FEDERAL DECISIONS CONCERNING THE APPLICABILITY OF *APPRENDI* TO INCREASED MAXIMUM SENTENCES BASED ON "DISCRETIONARY" FINDINGS BY JUDGES

The decision below is squarely in conflict with multiple state and federal decisions finding that discretionary persistent felony offender statutes—*i.e.*, recidivist statutes that increase a defendant's maximum sentence only if a judge makes a finding that public safety requires a lengthened sentence—violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. At least five states (Connecticut, Maine, Ohio, Minnesota, and Hawaii) and the Ninth Circuit have held that such statutes are unconstitutional, and district courts within the Second Circuit have held that application of the New York statute merits habeas corpus relief.

A. There Is An Irreconcilable And Entrenched Conflict That Requires This Court's Attention.

Connecticut, Maine, Ohio, Minnesota, and Hawaii, along with the Ninth Circuit and two district courts

in the Second Circuit, have held that discretionary persistent felony offender statutes that rely on judicial findings like those that were made in this case are unconstitutional.

In *State v. Bell*, 931 A.2d 198 (Conn. 2007), the Connecticut Supreme Court, interpreting a statute almost identical to New York's, noted that the statute's use of the conjunctive "and" imposed two preconditions for an enhanced sentence: (1) the court finding that the defendant is a persistent offender and (2) the court being "of the opinion" that the defendant's history and character and nature and circumstances of his or her criminal conduct indicate that extended incarceration will best serve the public interest. *Id.* at 227.[1] The Connecticut Supreme Court concluded that the statute's requirement that the court form an "opinion" was a requirement of judicial factfinding, as that term "typically is employed in situations wherein trial courts historically have

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[1] As relevant in *Bell*, Connecticut's persistent felony offender statutory scheme provided, in pertinent part:

> (h) When any person has been found to be a persistent dangerous felony offender, *and the court is of the opinion* that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that *extended incarceration and lifetime supervision will best serve the public interest*, the court . . . shall sentence such person to a term of imprisonment of not more than forty years [or, in some circumstances,] to a term of imprisonment of not more than life . . . .

CONN. GEN. STAT. § 53a-40 (2007) (emphasis added).

exercised reasoned judgment to make a determination that requires the consideration of various facts." *Id.* at 228. Citing this Court's decision in *Cunningham*, the Connecticut Supreme Court noted that even if the sentencing court was considering the type of facts courts have historically weighed in determining a sentence, the exercise of such discretion would violate the Sixth Amendment if it subjected the defendant to a higher sentence than that authorized by the jury's verdict alone. *Id.* at 229. Accordingly, the Connecticut Supreme Court ruled that the sentencing scheme violated the Sixth Amendment because it "'expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.* at 231 (quoting *Apprendi*, 530 U.S. at 494).

Maine reached a similar result. Under Maine's initial interpretation of its enhanced sentence statute, a sentence exceeding 20 years could be imposed if the sentencing judge was of the opinion that the crime was among "the most heinous and violent crimes committed against a person." *State v. Lewis*, 590 A.2d 149, 151 (Me. 1991). But in *State v. Schofield*, 895 A.2d 927 (Me. 2005), Maine's Supreme Court held that the statute could not "be constitutionally applied," since a judge, rather than the jury, made this determination. *Id.* at 933.[2]

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[2] Maine's statute provided, in pertinent part:

> *The court may consider* a serious criminal history of the defendant and impose a maximum period of incarceration in excess of 20 years based on either the nature or seriousness of the crime alone or the nature and seriousness of the crime coupled with the serious criminal history of the defendant.

In *State v. Foster*, 845 N.E.2d 470 (Ohio 2006), the Supreme Court of Ohio addressed whether Ohio's felony sentencing statute, which provided that a sentencing court could increase a repeat violent offender's prison term up to 10 years to "protect the public from future crime," violated the Sixth Amendment.[3] Specifically rejecting the State's argument that the required findings are merely "sentencing enhancements" or "traditional sentencing factors," *Foster*, 845 N.E.2d at 488-89, Ohio's highest court found that the statute violated *Blakely* because it "requires the court to make findings before

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ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (2001) (emphasis added). Prior to *Schofield*, the Maine legislature amended the statute in an attempt "to eliminate a 'constitutional cloud' created by *Apprendi*." *Schofield*, 895 A.2d at 930 n.4.

[3] Ohio's statute provided, in relevant part, that for repeat violent offenders, "*the court may impose on the offender an additional definite prison term*" of 1 to 10 years "*if the court finds that both of the following apply*":

> (i) The terms so imposed are inadequate to punish the offender and *protect the public from future crime* because the applicable factors . . . indicating a greater likelihood of recidivism outweigh the applicable factors . . . indicating a lesser likelihood of recidivism.
>
> (ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors . . . indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors . . . indicating that the offender's conduct is less serious than conduct normally constituting the offense.

OHIO REV. CODE § 2929.14(D)(2)(b) (1996) (emphasis added).

imposing an additional penalty on repeat violent offenders." *Id.* at 493.

The Court of Appeals of Minnesota similarly concluded that its dangerous persistent offender statute, which permitted sentence enhancement if the defendant had two or more prior convictions for violent crimes and "the court finds that the offender is a danger to public safety," violated this Court's ruling in *Blakely*. *State v. Fairbanks*, 688 N.W.2d 333, 336-37 (Minn. Ct. App. 2004), *rev. granted* (Minn. Jan. 20, 2005), *rev. denied* (Minn. Dec. 13, 2005).[4] To increase the sentence, the trial court was required to make "additional factual findings" and "rel[y] on statutory factors that were not a part of the stipulated trial facts," a process that violated the

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[4] The Minnesota statute provided for an increased sentence if:

> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) *the court finds that the offender is a danger to public safety and specifies on the record the basis for the finding*, which may include:
>
> > (i) the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications; or
> >
> > (ii) the fact that the present offense of conviction involved an aggravating factor that would justify a durational departure under the sentencing guidelines.

MINN. STAT. § 609.1095, subd. 2 (2002) (emphasis added).

defendant's Sixth Amendment right to a jury trial. *Fairbanks*, 688 N.W.2d at 336-37.[5]

In Hawaii, the state Supreme Court, following *Cunningham*, overturned prior precedent upholding the Hawaii statute, based on the court's candid recognition that "*Cunningham* rejected our long-held belief" that Hawaii's sentencing statute permitted judges to apply "traditional sentencing objectives." *State v. Maugaotega*, 168 P.3d 562, 574-75 (Haw. 2007).[6] The court explained that the *Cunningham* "majority nailed down the proposition that 'facts' included *any* findings of fact made by a judge—even those pertaining to matters within the traditional sphere of judicial sentencing discretion—that were

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[5] After review had been granted by the Minnesota Supreme Court, the statute was amended to replace "the court finds that the offender is a danger to public safety" with "the factfinder determines that the offender is a danger to public safety." MINN. STAT. § 609.1095, subd. 2 (2005). The Minnesota Supreme Court subsequently denied review. *See also State v. Kendell*, 723 N.W.2d 597, 610 n.11 (Minn. 2006) (noting denial of review after statute was amended).

[6] Hawaii's extended term sentencing scheme provided, in relevant part, that "a convicted defendant may be subject to an extended term of imprisonment" if he or she "is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is *necessary for protection of the public. The court shall not make this finding unless*" the defendant is being sentenced for multiple felonies or the maximum sentence permitted would equal or exceed 40 years. HAW. REV. STAT. § 706-662(4) (2004) (emphasis added). Even before *Maugaotega*, Hawaii's legislature amended the statute due to concerns that it violated *Apprendi*. *Maugaotega*, 168 P.3d at 564 n.1.

prerequisites to the imposition of an extended term sentence." *Id.* at 574 (emphasis in original).[7]

Finally, in the federal system, the Ninth Circuit—prior to the Hawaii courts' about-face in *Maugaotega*—affirmed a district court's grant of habeas relief based on an *Apprendi* challenge to the Hawaii extended sentence law. *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006). The Ninth Circuit reasoned that the mandatory second step of the two-step process for extended sentencing violated *Apprendi* because it required the court to "determine whether an extended sentence is necessary for the protection of the public," *id.* at 1059, a decision "a jury should have made," *id.* at 1062.

The judicial findings at issue in these cases are not meaningfully distinguishable from the findings required by New York's discretionary persistent felony offender scheme, yet New York is alone among these courts in continuing to find such a scheme constitutional.

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[7] State Supreme Courts in New Mexico and Tennessee have similarly concluded that in light of *Cunningham*, state sentencing statutes that had previously been found permissible by those courts are, in fact, violative of the Sixth Amendment. *See State v. Frawley*, 172 P.3d 144, 146, 153 (N.M. 2007); *State v. Gomez*, 239 S.W.3d 733, 737, 740-41 (Tenn. 2007). *See also State v. Price*, 171 P.3d 1223, 1226 (Ariz. 2007) ("catch-all" provision in statute, under which judge increased the sentence based upon the court's belief that the defendant was a "danger to the community," violated *Apprendi* and *Cunningham*).

B. The Split Within The Second Circuit Makes Resolution Of The Conflict Particularly Pressing.

The conflict is particularly problematic because of the effect of the split between the New York state courts and the federal courts with habeas corpus jurisdiction to review New York criminal convictions and sentences for violations of the Sixth Amendment.

This problem is illustrated by the similar conflict that existed in the Ninth Circuit prior to the Hawaii Supreme Court's recognition in *Maugaotega* that Hawaii's sentencing scheme was unconstitutional. Until that time, despite the Ninth Circuit's holding in *Kaua*, 436 F.3d at 1062, the Hawaii Supreme Court expressly "decline[d] to follow the Ninth Circuit's holding." *State v. White*, 129 P.3d 1107, 1109 n.4 (Haw. 2006). This conflict rendered every Hawaii extended felony offender sentence subject to vacatur based on an almost certain grant of habeas relief.[8]

A similar intra-circuit conflict has developed in the Second Circuit. Two respected judges in the Eastern and Southern Districts of New York have held that New York's discretionary persistent felony offender

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[8] *See Kamana'o v. Peyton*, No. 05-00681, 2006 WL 1775869, at *4 (D. Haw. June 21, 2006) (granting habeas petition as "[t]his court is bound by the Ninth Circuit's decision in *Kaua*"); *see also Lanosa v. Frank*, No. 07-00115, 2007 WL 2746839, at *4, *8 (D. Haw. Sept. 17, 2007) (granting habeas petition and adopting magistrate finding that pursuant to *Kaua*, extended sentence violated *Apprendi*), *aff'd*, 304 F. App'x 565 (9th Cir. 2008); *Keck v. Luna*, No. 06-00571, 2007 WL 2263060, at *3, *6 (D. Haw. Aug. 7, 2007) (same); *Brown v. White*, No. 06-00496, 2007 WL 1977277, at *1 (D. Haw. July 3, 2007) (same).

scheme not only violates the Sixth Amendment, but violates it so clearly that habeas relief is warranted in any case in which such a sentence is imposed. *See Washington v. Poole*, 507 F. Supp. 2d 342 (S.D.N.Y. 2007) (Koeltl, J.); *Portalatin v. Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007) (Gleeson, J.).[9] The Second Circuit is currently considering the same habeas argument in a consolidated appeal argued in April 2008. *See Washington v. Poole*, No. 07-3949, *Portalatin v. Graham*, No. 07-1599, *Morris v. Artus*, No. 07-3588, and *Phillips v. Artus*, No. 06-3550.

Regardless of the ultimate Second Circuit decision on the habeas issue, this Court's review of the decision in this case is needed. If the Second Circuit affirms *Portalatin* and *Washington*, federal courts in the Second Circuit will be bound to grant habeas relief to every individual sentenced pursuant to New York's persistent felony statute, an unstable and untenable situation that could only be resolved by this Court. If the Second Circuit were to hold that the New York state decisions were incorrect, but not so unreasonable as to merit habeas relief, this Court's intervention would likewise be necessary. *See Mincey v. Arizona*, 437 U.S. 385, 403-04 (1978) (Marshall, J., concurring) ("If certiorari had not been granted, we would have left standing a decision of the State's highest court on a question of federal constitutional law that had been resolved in a directly opposing way

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[9] *But cf. Daniels v. Conway*, No. 06 Civ. 11457, 2009 WL 466804 (S.D.N.Y. Jan. 15, 2009) (magistrate report recommending denial of habeas challenge); *Morris v. Artus*, No. 06 Civ. 4095, 2007 WL 2200699 (S.D.N.Y. July 30, 2007) (Sweet, J.) (denying habeas petition).

by the highest federal court having special responsibility for the State.").

Finally, even if the Second Circuit were to uphold the constitutionality of the New York sentencing scheme, there would remain a deep and entrenched conflict between New York and multiple other state courts, and between the Second and Ninth Circuits. This situation, too, would warrant this Court's review. *See PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 710 (1994) (granting certiorari to resolve a conflict among the state courts of last resort).

II. THE DECISION BELOW IS CONTRARY TO THIS COURT'S HOLDINGS IN *APPRENDI*, *BLAKELY*, AND *CUNNINGHAM*

As this Court held in *Blakely v. Washington*, 542 U.S. 296, 303 (2004), a defendant's sentence cannot be increased above the maximum that could be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (emphasis in original). That maximum therefore cannot be increased based on a finding by a judge – even a finding "'that traditionally has been incident to the judge's selection of an appropriate sentence.'" *Cunningham v. California*, 549 U.S. 270, 289 (2007) (quoting *People v. Black*, 113 P.3d 534, 543 (Cal. 2005)). The decision below is flatly contrary to these principles, as reflected in the federal habeas decisions holding that the position of the New York Court of Appeals is not even *reasonable* under this Court's cases.

The *Apprendi* violation at issue is straightforward. New York's discretionary persistent felony offender statute increases the statutory maximum punishment by permitting a sentencing court to impose a class A-I felony sentence in place of the sentence authorized by the jury verdict. To impose such a sentence, the court must make two findings: (1) that the defendant has been previously convicted of at least two felonies "and" (2) that "it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." N.Y. PENAL LAW § 70.10(2). The New York rules of procedure specify that a persistent felony enhancement "*may not be imposed unless*" the court makes both findings, and the "standard of proof with respect to [the second prong] shall be a preponderance of the evidence." N.Y. CRIM. PROC. LAW § 400.20(1), (5) (emphasis added).

This procedure plainly violates the Sixth Amendment. The first prong admittedly falls within *Apprendi*'s exception permitting judges to find the fact of a prior conviction. *Apprendi*, 530 U.S. at 490. But the second prong, pertaining to the history and character of the defendant and the nature and circumstances of his criminal conduct, requires the judge to make the factual determinations necessary to the sentence enhancement, and only by a preponderance of the evidence, not beyond a reasonable doubt. N.Y. CRIM. PROC. LAW § 400.20(5). A statutory sentence enhancement provision requiring a judicial finding of aggravating circumstances by a preponderance of the evidence is "a clear factfinding directive to which there is no

exception," and therefore a Sixth Amendment violation. *Cunningham*, 549 U.S. at 279, 293.

Nor does it make any difference that the second prong finding here is phrased in terms like "opinion" and the "public interest." *Cf. People v. Rivera*, 833 N.E.2d 194, 200 n.8 (N.Y. 2005) (distinguishing the persistent felony offender statute from the statute in *Apprendi* because in New York the judge must "consider holistically the defendant's entire circumstances and character"). *Blakely* made it clear that *any* finding that increases the statutory maximum must be found by a jury: "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*) . . . or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." 542 U.S. at 305 (emphasis in original); *see also Cunningham*, 549 U.S. at 290 ("broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions"); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").[10]

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[10] Furthermore, the New York court's emphasis on "traits . . . unrelated to the crime of conviction," *Rivera*, 833 N.E.2d at 200 n.8, is irrelevant. Even if *Apprendi* applied only to facts relating directly to the crime of conviction, which it does not, the New York statute *does* demand judicial factfinding as to "the nature and circumstances of [the] criminal conduct." N.Y. PENAL LAW §

Particularly puzzling is the Court of Appeals's continuing justification of judicial factfinding under the second prong as merely "set[ting] the parameters for the performance of one of the sentencing court's most traditional and basic functions, *i.e.*, the exercise of sentencing discretion." Pet App. 17a-18a; *see also Rivera*, 833 N.E.2d at 200 ("[i]n practical terms" the second prong "merely makes explicit what sentencing courts have always done" and "falls squarely within the most traditional discretionary sentencing role of the judge"); *Rosen*, 752 N.E.2d at 847 ("the sentencing court is thus only fulfilling its traditional role"). This reasoning flies in the face of *Cunningham*, in which this Court expressly rejected an exception for factfinding "that traditionally has been incident to the judge's selection of an appropriate sentence." *Cunningham*, 549 U.S. at 289 (internal quotation marks omitted). Indeed, the distinction made by the Court of Appeals is phrased nearly identically to the distinction rejected in *Cunningham*.

The Court of Appeals also misapprehended this Court's precedents in its effort to distinguish them as uniformly involving "judicial fact-finding of an element(s) of an offense[,]" in purported contrast to the New York scheme, which "requires that the sentencing court make a qualitative judgment about, among other things, the defendant's criminal history and the circumstances surrounding a particular offense." Pet. App. 17a. *Cunningham* specifically rejected distinctions between facts concerning the offense and facts concerning the offender, declaring

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70.10(2). That the statute also contemplates factfinding as to unrelated traits can hardly remedy the constitutional violation.

that *Apprendi* "leaves no room for the bifurcated approach." 549 U.S. at 291 n.14; *see also Blakely*, 542 U.S. at 305 (violation occurs when judge finds "*any* aggravating fact") (emphasis in original); *Apprendi*, 530 U.S. at 494 ("relevant inquiry" is one of "effect" and not "form").

Also unavailing is the Court of Appeals's attempt to characterize the first prong alone as making the defendant "eligible" for an enhanced sentence. Pet. App. 13a; *Rivera*, 833 N.E.2d at 199; *Rosen*, 752 N.E.2d at 847. This attempt to downplay the required second-prong finding is of no relevance for Sixth Amendment purposes. Indeed, this Court rejected a similar argument in *Ring*, in which it was contended that the requirement that a judge find an aggravating circumstance could be ignored because the jury verdict alone authorized a maximum sentence of death. This Court made clear that the Sixth Amendment could not be evaded by mere characterization: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 536 U.S. at 602.

Here, there is no doubt that the increase in punishment is contingent on the sentencing judge making *both* statutory findings. The relevant statutes themselves expressly require both findings: the enhanced sentence "may not be imposed unless" both findings are made. N.Y. CRIM. PROC. LAW § 400.20(1), (5). And there is nothing in the opinion below or any other Court of Appeals opinion that excises the second required finding. *See, e.g.*, *Washington*, 507 F. Supp. 2d at 359 ("[A]s Judge Gleeson correctly

recognized, the New York Court of Appeals did not excise any requirements of N.Y. Penal Law § 70.10 or of N.Y. Crim. Proc. Law § 400.20.").

Indeed, the New York courts have regularly enforced the requirement that the sentencing judge make both statutory findings—and have continued to do so after *Quinones*. The appellate courts routinely vacate discretionary persistent felony offender sentences where the sentencing judge fails to make the required second-prong findings. *See, e.g., People v. Rivera*, 60 A.D.3d 788, 790, 875 N.Y.S.2d 173, 177 (2d Dep't 2009) (vacating sentence where the trial court "'fail[ed] to set forth, on the record, the reasons why it was "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate[d] that extended incarceration and life-time supervision [would] best serve the public interest"'") (quoting *People v. Murdaugh*, 38 A.D.3d 918, 920, 833 N.Y.S.2d 557, 559 (2d Dep't 2007) (quoting N.Y. PENAL LAW § 70.10(2))); *see also People v. Bazemore*, 52 A.D.3d 727, 728, 860 N.Y.S.2d 602, 603 (2d Dep't 2008) (same); *People v. Bingham*, 24 A.D.3d 1016, 1016-17, 806 N.Y.S.2d 768, 769 (3d Dep't 2005) (same); *People v. Ruffins*, 6 A.D.3d 1153, 1154, 776 N.Y.S.2d 405, 407 (4th Dep't 2004) (same).[11]

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[11] Furthermore, the Court of Appeals's elaboration of its own reasoning refutes any contention that the mere fact of prior convictions is all that is required: "If, for example, a defendant had an especially long and disturbing history of criminal convictions, a persistent felony offender sentence might well be within the trial justice's discretion even with no further factual findings." *Rivera*, 833 N.E.2d at 201. The example given is clearly unconstitutional; it requires the judge to find, as a

In short, it is "clear, even after the [Court of Appeals's] decision, that before a persistent felony sentence is imposed the sentencing court must find two things . . . *both* the two prior convictions *and* the findings with respect to the defendant and his criminal conduct." *Washington*, 507 F. Supp. 2d at 360 (emphasis in original). Because this requirement is contrary to this Court's Sixth Amendment precedent and in conflict with the decisions of other jurisdictions, this Court should grant certiorari.

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matter of fact, not only that there were prior convictions, but that those convictions constituted *an especially long and disturbing history*. *See Washington*, 507 F. Supp. 2d at 361 ("In the [*Rivera*] court's example, it is not simply the fact of the prior convictions that triggers the possibility of imposing the enhanced sentence, but the nature of that criminal history.").

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully Submitted,

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May 26, 2009

APPENDIX

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT

v.

GEORGE QUINONES, *APPELLANT*.

Court of Appeals of New York

Argued January 13, 2009
Decided February 24, 2009

OPINION OF THE COURT

Jones, J.

This appeal presents another *Apprendi*[1] challenge to New York's discretionary persistent felony offender sentencing scheme. The primary issue before us is whether, in light of *Cunningham v California* (549 US 270 [2007]), this sentencing scheme violates *Apprendi* and defendant's due process and Sixth Amendment rights. We again uphold the constitutionality of New York's discretionary persistent felony offender sentencing scheme and further hold that defendant's constitutional rights were not violated.

Facts and Procedural History

On April 21, 2004, at about 12:05 p.m., the police received a radio run of a burglary in progress on the fifth floor of a six-floor apartment building located in Brooklyn, New York. The building, which is part of a New York City Housing Authority development, had two stairwells (Stairwell A and

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[1] *Apprendi v New Jersey*, 530 US 466 (2000).

Stairwell B). The stairwells met on the fourth floor and were connected by a door. The radio run included physical descriptions of two perpetrators. Within minutes of the radio run, two police officers entered the building and split up, each going up one stairwell. On the fourth floor, the officer going up Stairwell A looked into Stairwell B through the door window and observed defendant, who matched the physical description of one of the perpetrators, as he was coming down from the fifth floor carrying a duffel bag. At about this time, the other officer was coming up Stairwell B. Seeing this, defendant quickly changed direction and proceeded to Stairwell A. When defendant opened the door to Stairwell A, he came upon the first officer and his eyes "popped open" in surprise. The officer asked defendant who he was and what he was doing in the building. Defendant, who was not a resident of the building, tried to evade the officer, who, in turn, tried to prevent defendant from leaving by reaching out and grabbing his arm. Defendant tried to break free by swinging at the officer with his other arm. After a brief struggle, the police subdued defendant and placed him under arrest. One of the officers went to the fifth floor (the floor defendant was coming from) where he discovered that the door to apartment 5-I was open, the lock on the door broken, the door frame damaged and the apartment ransacked. After taking defendant to a police precinct for processing, the police officers searched the bag defendant had been carrying and recovered burglary tools and property later determined to be property stolen during the burglary.

Defendant, arguing that his arrest was the product of an illegal stop and detention, and that

everything flowing from this illegality was tainted, moved to suppress the statement he made to a police officer after his arrest (he confessed to participating in the burglary as a "lookout") and the property recovered from his duffel bag. Supreme Court held a *Dunaway/Huntley* hearing and considered defendant's arguments. In light of the evidence adduced at the hearing, including the fully credited testimony of the arresting police officer, Supreme Court rejected defendant's arguments and denied the motion in its entirety.

A jury ultimately convicted defendant of burglary in the third degree (Penal Law § 140.20 ["(a) person is guilty of (third degree burglary) when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein"]), a class D felony which gives rise to an indeterminate sentence. Under the Penal Law, the maximum term for such sentence is at least three years and no more than seven years (Penal Law § 70.00 [2] [d]). Prior to sentencing, the People moved for Supreme Court to sentence defendant as a discretionary persistent felony offender. In so moving, the People sought to treat defendant's class D felony as a class A-I felony (Penal Law § 70.10 [2]) and have defendant sentenced to an indeterminate prison term of 25 years to life (Penal Law § 70.00 [2] [a]; [3] [a] [i]). Defendant opposed the motion, arguing that the discretionary persistent felony offender sentencing scheme was unconstitutional under *Apprendi* and its progeny.

Supreme Court held a hearing pursuant to CPL 400.20 to determine whether to adjudicate defendant a discretionary persistent felony offender

and impose a recidivist sentence. As set forth in CPL 400.20 (5), the court first concluded that defendant was a discretionary persistent felony offender based on defendant's four prior felony convictions-a 1983 robbery conviction, a 1986 grand larceny conviction, a 1989 attempted robbery conviction and a 1994 attempted criminal sale of a controlled substance conviction (Penal Law § 70.10 [1] [a]). The court determined that defendant was eligible to be sentenced as a discretionary persistent felony offender and that a recidivist sentence was warranted. Defendant was sentenced to an indeterminate prison term of 18 years to life.[2] The Appellate Division unanimously affirmed, concluding, among other things, that the police had reasonable suspicion to stop and detain defendant based on his "attempted flight" and "the temporal proximity between the reported robbery and the officers' arrival on the scene" (45 AD3d 874, 875 [2007]). The court also concluded that in light of this Court's decisions in *People v Rosen* (96 NY2d 329 [2001]) and *People v Rivera* (5 NY3d 61 [2005]), defendant's *Apprendi* challenge lacked merit. A Judge of this Court granted defendant leave to appeal (10 NY3d 815 [2008]).

Discussion

Defendant seeks to have his conviction reversed on two grounds. First, he argues that Supreme Court erred in not suppressing his

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[2] The court noted that "[d]efendant's background reveals a twenty-year criminal history which includes four felony convictions, three of which are violent felonies. . . . In addition, [d]efendant has six misdemeanor convictions . . . Thus, [d]efendant's criminal record establishes that he has made a career of crime, that he lacks respect for people and their property, and that he is a menace to society."

confession and the property recovered from his bag because they were the product of an illegal stop and detention. Second, defendant claims ineffective assistance of trial counsel based on his counsel's failure to argue that even if the stop and detention were legal, the recovered property should have been suppressed because of the illegality of the warrantless search of defendant's bag at the precinct.

(1) Regarding defendant's first contention, Supreme Court's determination that the police possessed reasonable suspicion to stop and detain defendant (*see People v De Bour*, 40 NY2d 210, 223 [1976];*People v Hollman*, 79 NY2d 181, 184-185 [1992];*People v McIntosh*, 96 NY2d 521, 525 [2001]), a mixed question of law and fact, was not disturbed by the Appellate Division and is supported by the record. Accordingly, this determination is beyond our further review (*see People v Harrison*, 57 NY2d 470, 477-478 [1982];*People v Allen*, 9 NY3d 1013, 1015 [2008]).

(2) With respect to defendant's ineffective assistance claim, we note that the facts surrounding the search of defendant's bag were not fully developed at the suppression hearing. Accordingly, it is not clear what counsel knew or did not know regarding the search, such as whether the search was in accordance with police inventory procedures. Nor is it clear that this argument would have resulted in suppression of the evidence. Therefore, on the record before us, we are unable to determine that counsel's assistance was ineffective.

(3) Defendant also argues that his recidivist sentence violates *Apprendi*. Specifically, defendant asserts that in light of *Cunningham*, the sentence

violates his right to due process and trial by jury, and New York's discretionary persistent felony offender sentencing scheme is constitutionally infirm. Defendant's arguments are unavailing.

In *Apprendi v New Jersey* (530 US 466 [2000]), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*Apprendi*, 530 US at 490). In so holding, the *Apprendi* Court's goal was to prevent legislative attempts to "remove from the [province of the] jury" factual determinations that impact the maximum punishment available for a statutory offense (*id.*[internal quotation marks omitted]).[3] *Apprendi* and its progeny are rooted in the United States Constitution's Sixth Amendment, which provides every person accused of a crime the right to "trial[ ] by an impartial jury," and emanated from the Supreme Court's prior decisions in *Almendarez-Torres v United States* (523 US 224, 226-227 [1998] [judicial fact-finding of a defendant's prior

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[3] The *Apprendi* rule seeks to preserve the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense (*see Apprendi*, 530 US at 477). In further support of the rule, the Supreme Court stated that "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of . . . [an offense] to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. . . . Our rule ensures that a State is obliged to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices of exposing all who are convicted to the maximum sentence it provides" (*id.* at 490 n 16 [internal quotation marks omitted]).

conviction and consideration of same at sentencing is not a violation of the Sixth Amendment]) and *Jones v United States* (526 US 227, 239-252 [1999] [Court recognized that judicial fact-finding, outside the finding of a defendant's prior convictions, operating to increase a defendant's maximum punishment would diminish the role of the jury, thus creating a genuine issue under the Sixth Amendment]).[4]

At issue in *Apprendi* was a New Jersey statutory scheme that allowed a judge to increase a defendant's punishment beyond the maximum sentence range authorized for the crime of possession of a firearm for an unlawful purpose based on the judge's finding by a preponderance of the evidence that defendant also committed a crime with the intent to intimidate based on race, religion, color, gender, ethnicity, sexual orientation or handicap. The Supreme Court held that because this sentencing scheme (1) removed what amounts to an element of a

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[4] *See Ring v Arizona*, 536 US 584, 602 (2002) (Court clarified *Apprendi* rule by stating, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt"); *Blakely v Washington*, 542 US 296, 303, 304 (2004) (Court stated: 1. the " 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," and 2. "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' . . . and the judge exceeds his proper authority"); *United States v Booker*, 543 US 220, 232 (2005) (a judge's determination of a fact that elevates defendant's sentence above the "statutory maximum," i.e., above the range authorized by a jury's verdict or defendant's admission of guilt, violates the Sixth Amendment).

greater offense that would ordinarily be submitted to the jury (and proved beyond a reasonable doubt), and (2) allowed a judge to decide the fact using a lesser standard of proof and, thereby, increase the sentence beyond the permissible maximum sentence range, it violated the Sixth Amendment right to a trial by jury.

The common denominator of the sentencing schemes invalidated or partially struck down in the wake of *Apprendi* is that they provided for an increase to defendant's punishment-beyond the range authorized by the jury's finding of guilt or defendant's admission-based on additional facts found by a judge using a preponderance-of-the-evidence standard (*see e.g. Ring* [sentencing scheme at issue provided that defendant convicted of first degree murder could only be sentenced to life imprisonment unless the judge determined the existence of aggravating factors warranting the imposition of the death penalty]; *Blakely* [sentencing scheme permitted an enhanced sentence beyond the statutory maximum based on the judge's finding that defendant committed the crime with "deliberate cruelty" (542 US at 298)]; *Booker* [portion of the mandatory Federal Sentencing Guidelines required judicial fact-finding that could increase the maximum potential sentence of a defendant]). California's determinate sentencing law (DSL) at issue in *Cunningham* was no different.

In describing California's DSL, the Supreme Court noted that

> "[f]or most offenses, including Cunningham's, the DSL regime is implemented in the following manner. The statute defining the offense prescribes three precise terms of

> imprisonment-a lower, middle, and upper term sentence. *E.g.*, Penal Code § 288.5 (a) (West 1999) (a person convicted of continuous sexual abuse of a child 'shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years') See also [*People v Black*], 35 Cal. 4th [1238,] 1247 . . . Penal Code § 1170 (b) (West Supp. 2006) controls the trial judge's choice; it provides that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' '[C]ircumstances in aggravation or mitigation' are to be determined by the court after consideration of several items: the trial record; the probation officer's report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; 'and any further evidence introduced at the sentencing hearing.' *Ibid.*" (*Cunningham*, 549 US at 277.)

In addition, the DSL "directed the State's Judicial Council to adopt Rules guiding the sentencing judge's decision whether to '[i]mpose the lower or upper prison term.' Penal Code § 1170.3 (a) (2) (West 2004). Restating [Penal Code] § 1170 (b), the Council's Rules provide that '[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.' Rule 4.420 (a). 'Circumstances in aggravation,' as crisply defined by the Judicial Council, means '*facts* which justify the imposition of the upper prison term.' Rule 4.405 (d) (emphasis added). Facts aggravating an offense, the Rules instruct, 'shall be established by a

preponderance of the evidence,' Rule 4.420 (b), and must be 'stated orally on the record.' Rule 4.420 (e).

"The Rules provide a nonexhaustive list of aggravating circumstances, including [facts relating to the crime committed and defendant] . . . Beyond the enumerated circumstances, 'the judge is free to consider any "additional criteria reasonably related to the decision being made."' *Black*, 35 Cal. 4th, at 1247. 'A fact that is an element of the crime,' however, 'shall not be used to impose the upper term.' Rule 4.420 (d). In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts-whether related to the offense or the offender-beyond the elements of the charged offense" (*id.* at 278-279 [footnotes and some citations omitted]).

Because California's DSL, by its plain terms, authorized the judge, not the jury, to find facts exposing defendant to an elevated upper term sentence, the Supreme Court held that this sentencing scheme violated defendant's Sixth Amendment right to a trial by jury and *Apprendi* (*see id.* at 274). Citing *Blakely*, the *Cunningham* Court made clear that

> "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our [*Apprendi*] decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact

> to impose the longer term, the Sixth Amendment requirement is not satisfied" (*id.* at 290, citing *Blakely*, 542 US at 305).

Here, defendant argues that New York's discretionary persistent felony offender sentencing scheme suffers from the same constitutional infirmity as California's DSL because the "higher persistent felony offender range cannot be imposed without the judicially-found fact that the 'nature and circumstances' of the criminal conduct and the 'history and character' of the defendant warrant lifetime supervision in the public interest." Defendant's view of New York's sentencing scheme is inaccurate.

The discretionary persistent felony offender sentencing scheme is comprised of two statutes: Penal Law § 70.10 and Criminal Procedure Law § 400.20. Under Penal Law § 70.10 (1) (a), "[a] persistent felony offender is a person, other than a persistent violent felony offender as defined in [Penal Law §] 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies." Penal Law § 70.10 (2) further provides:

> "When the court has found, pursuant to [Criminal Procedure Law § 400.20], that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized [under Penal Law article 70] for the crime of which such person

> presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record."

Criminal Procedure Law § 400.20 sets forth the procedure for determining whether a defendant should be sentenced as a persistent felony offender. Under Criminal Procedure Law § 400.20 (1),

> "[s]uch sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender . . . , and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that [such sentence is] warranted to best serve the public interest."

At the hearing provided for under this sentencing scheme, the burden is on the People to prove beyond a reasonable doubt that defendant is a persistent felony offender (CPL 400.20 [5]). Once defendant has been proven to be a persistent felony offender,"[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence" (*id.*).

After the hearing, if the court "is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in

accordance with [Penal Law § 70.10 (2)]" (CPL 400.20 [9]). In sum, under New York's discretionary persistent felony offender sentencing scheme, once the People prove beyond a reasonable doubt that a defendant is a persistent felony offender (i.e., a twice-prior convicted felon), defendant is eligible to be sentenced as a discretionary persistent felony offender and the court may consider defendant's "history and character" to determine whether a discretionary persistent felony offender sentence is warranted.

This Court has on two occasions conducted an extensive analysis regarding whether New York's discretionary persistent felony offender sentencing scheme violates *Apprendi* (*see People v Rosen*, 96 NY2d 329 [2001],*cert denied,* 534 US 899 [2001]; *People v Rivera*, 5 NY3d 61 [2005], *cert denied* 546 US 984 [2005]). In *Rosen*, we held that upon proving that a defendant is a twice-prior convicted felon, the sentencing court may review defendant's history and character as well as the nature and circumstances of defendant's criminal conduct to determine whether to impose a recidivist (enhanced) sentence (CPL 400.20 [5]) and that, under the discretionary persistent felony offender statutes, prior felony convictions are the sole determinant of whether a defendant is eligible for recidivist sentencing as a persistent felony offender (*Rosen*, 96 NY2d at 335). *Rivera*, which was decided after *Blakely* and *Booker*, upheld *Rosen* (in reasoning and result), the discretionary persistent felony offender statutes and the recidivist sentence

imposed (*Rivera*, 5 NY3d at 63).[5] As we stated in *Rivera*,

"the relevant question under the United States Constitution is not whether those facts were essential to the trial court's opinion (CPL 400.20 [1] [b]), but whether there are any facts other than the predicate convictions that must be found to make recidivist sentencing possible (*see Blakely*, 542 US at 303-304). Our answer is no. As we explained in *Rosen*, the predicate felonies are both necessary and sufficient conditions for imposition of the authorized sentence for recidivism; that is why we pointedly called the predicate felonies the 'sole' determinant (96 NY2d at 335). By this unequivocal statement, we meant, and today confirm, that Criminal Procedure Law § 400.20, by authorizing a hearing on facts relating to the defendant's history and character, does not grant defendants a legal entitlement to have those facts receive controlling weight in influencing the court's opinion. The statutory language requiring the sentencing court to consider the specified factors and to articulate the reason for the chosen sentence grants defendants a right to an airing and an explanation, not a result. . . .

"To reiterate our analysis in *Rosen*, a defendant adjudicated as a persistent felony offender has a statutory right to present evidence that might influence the court to exercise its discretion to hand

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[5] Applying *Rivera*, we have rejected, as meritless, four challenges to the constitutionality of the discretionary persistent felony offender statutes (*see People v Daniels*, 5 NY3d 738 [2005]; *People v West*, 5 NY3d 740 [2005]; *People v Leon*, 10 NY3d 122 [2008]; *People v Rawlins*, 10 NY3d 136 [2008]). Note, *Leon* and *Rawlins* were decided after *Cunningham*.

down a sentence as if no recidivism finding existed, while the People retain the burden to show that the defendant deserves the higher sentence. Nevertheless, once a defendant is adjudged a persistent felony offender, a recidivism sentence cannot be held erroneous as a matter of law, unless the sentencing court acts arbitrarily or irrationally" (*id.* at 67-68 [footnote omitted]).

The preceding discussion makes clear that California's DSL and New York's discretionary persistent felony offender sentencing scheme are fundamentally different. The DSL accorded judges discretion to find the facts necessary for the imposition of an enhanced sentence (i.e., one beyond the relevant sentencing range authorized by a jury's verdict based on findings other than a defendant's prior convictions). That is, a defendant was only eligible for an enhanced sentence upon a judicial determination of certain facts other than recidivist status. Thus, the DSL is precisely the type of sentencing scheme that has been repeatedly invalidated under *Apprendi*.

New York's sentencing scheme, in contrast, is a recidivist sentencing scheme. That is, under New York's scheme, a defendant is subject to an enhanced sentence based solely on the existence of two prior felony convictions. This fact alone places the New York scheme outside the scope of the *Apprendi* rule. Another distinguishing feature of New York's sentencing scheme is that it is only after a defendant's eligibility for an enhanced sentence is determined that a judge is given the discretion to choose *the appropriate sentence within a sentencing range prescribed by statute*. A common theme of the

Apprendi decisions is that sentencing schemes allowing for such discretion are permissible under the Sixth Amendment. For example, the *Apprendi* Court stated that

> "nothing in [the Sixth Amendment's] history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case" (*Apprendi*, 530 US at 481; *see Booker*, 543 US at 235 [the Sixth Amendment does not prohibit a judge from exercising his or her discretion within a sentence range authorized by a jury's verdict or defendant's admission of guilt-such an exercise does not impinge on the jurors' role in determining the upper limits of a defendant's sentence]).

Regarding the discretion a sentencing court must exercise, the Supreme Court further explained: "Of course indeterminate [sentencing] schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that

punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury" (*Blakely*, 542 US at 309).

Taking the foregoing into account, defendant's argument that the higher persistent felony offender range cannot be imposed without judicially-found facts regarding the "nature and circumstances" of defendant's criminal conduct and defendant's "history and character" misses the point. Unlike the sentencing schemes in *Apprendi*, *Ring*, *Blakely*, *Booker* and *Cunningham*, all of which effectively provided for judicial fact-finding of an element(s) of an offense as a prerequisite to enhancing a sentence *beyond* the relevant sentencing range, the New York sentencing scheme, after a defendant is deemed eligible to be sentenced as a persistent felony offender, requires that the sentencing court make a qualitative judgment about, among other things, the defendant's criminal history and the circumstances surrounding a particular offense in order to determine whether an enhanced sentence, *under* the statutorily prescribed sentencing range, is warranted. Stated differently, New York's sentencing scheme, by requiring that sentencing courts consider defendant's "history and character" and the "nature and circumstances" of defendant's conduct in deciding where, within a range, to impose an enhanced sentence, sets the parameters for the performance of one of the sentencing court's most

traditional and basic functions, *i.e.*, the exercise of sentencing discretion.[6]

Finally, the *Cunningham* Court considered and struck down a sentencing scheme similar to those in *Blakely* and *Booker*. In so ruling, the Supreme Court did not expand the contours of the *Apprendi* rule so that it would be applicable to New York's recidivist sentencing scheme (*see Cunningham*, 549 US at 281 [a court's application of the *Apprendi* rule must honor the "longstanding common-law practice" that provides its foundation]; *Oregon v Ice*, 555 US ---, ---, 129 S Ct 711, 714 [2009] [Court stated that it "has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions"]).

Based on the foregoing, we hold that *Cunningham* does not render New York's discretionary persistent felony offender sentencing scheme unconstitutional.

Accordingly, the order of the Appellate Division should be affirmed.

Judges Ciparick, Graffeo, Read, Smith and Pigott concur; Chief Judge Lippman taking no part.

Order affirmed.

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[6] The exercise of a trial court's sentencing discretion is subject to review by the Appellate Division. In the exercise of its discretion in the interest of justice (*see* CPL 470.20 [6]), the Appellate Division "may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" (*Rivera*, 5 NY3d at 68).

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT

v.

GEORGE QUINONES, *APPELLANT.*

Supreme Court, Appellate Division, Second Department, New York

November 27, 2007

OPINION OF THE COURT

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Ingram, J.), rendered May 11, 2005, convicting him of burglary in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of the defendant's omnibus motion to suppress physical evidence and statements made to law enforcement officials.

Ordered that the judgment is affirmed.

The hearing court properly denied the defendant's motion to suppress physical evidence and statements made to law enforcement officials because the police lawfully stopped and detained the defendant. The police had a founded suspicion that criminal activity was afoot when they observed the defendant, who matched the general description of a robbery suspect in a radio call, in the stairwell of the building where the reported robbery occurred (*see People v Hollman*, 79 NY2d 181, 184-185 [1992]; *People v De Bour*, 40 NY2d 210, 223 [1976]). The defendant's attempted flight, combined with the temporal proximity between the reported robbery and the officers' arrival on the scene, gave the police

reasonable suspicion to detain the defendant (*see People v Woods*, 98 NY2d 627 [2002]; *People v Wilson*, 5 AD3d 408 [2004]; *People v Sergeant*, 281 AD2d 438 [2001]; *People v Blunt*, 276 AD2d 495 [2000]).

The defendant's contention that the search of his duffel bag without a warrant constituted an unreasonable search and seizure, was not raised at the suppression hearing, and thus, it is unpreserved for appellate review (*see* CPL 470.05 [2]) and, in any event, is without merit (*see People v Brown*, 36 AD3d 931 [2007]).

Finally, the defendant's contention that his sentencing as a persistent felony offender violated his constitutional rights pursuant to *Apprendi v New Jersey* (530 US 466 [2000]) is without merit (*see People v Rivera*, 5 NY3d 61 [2005],*cert denied* 546 US 984 [2005]; *People v Rosen*, 96 NY2d 329 [2001], *cert. denied* 534 US 899 [2001]; *People v Hargroves*, 27 AD3d 765 [2006]). Schmidt, J.P., Rivera, Florio and Balkin, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE QUINONES, Defendant

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM, PART 21

DECISION ON PERSISTENT FELONY OFFENDER HEARING

Indictment No. 2584/04

Defendant stands convicted, after jury trial, of Burglary in the Third Degree (Penal Law § 140.20) a class "D" felony. In addition, he has four prior convictions for felony offenses. The People requested that the Court sentence him as a Persistent Felony Offender. Defendant opposed. Based on Defendant's four felony convictions, the Court found that Defendant is eligible to be sentenced as a persistent felony offender (Penal Law § 70.10[1][a] [persistent felony offender is "who stands convicted of a felony after having been previously been convicted of two or more felonies"]), On May 11, 2005, the Court conducted a hearing to determine whether to impose such sentence. The Court considered Defendant's history and character and the nature and circumstances of his criminal conduct and whether extended incarceration and lifetime supervision were warranted to best serve the public interest (Penal Law § 70.10[2]). Based on the moving papers, the opposing papers, and the evidence submitted by the

parties at the hearing, the Court found that a recidivist sentence should be imposed.

Defendant's background reveals a twenty-year criminal history which includes four felony convictions, three of which are violent felonies. In one case, Defendant and two cohorts robbed a salesman in front of St. Francis de Salle School for the Deaf by holding the victim in a choke hold and slashing his pocket to take his money. The victim had been at the school for a sales call. In another case, Defendant, acting with two cohorts, robbed an undercover police officer who was posing as a decoy and sleeping on the A train. In that case, Defendant took the wallet from the officer. In another case, Defendant assaulted his victim and then took her money. In his most recent felony conviction, he participated in the burglary of an apartment in public housing. In addition, Defendant has six misdemeanor convictions which include, but are not limited to, a conviction for Possession of a Controlled Substance in the Seventh Degree, Criminal Trespass in the Second Degree, Theft of Services, and Petit Larceny. Thus, Defendant's criminal record establishes that he has made a career of crime, that he lacks respect for people and their property, and that he is a menace to society.

Furthermore, Defendant's extensive criminal history also shows that he has utter disregard for the criminal justice system; that he cannot been rehabilitated, and that society is unsafe when he is not incarcerated. Indeed, Defendant's twenty-year history shows the following repeated pattern of behavior: that he commits a crime, is convicted and sentenced, and after being released from prison and

while still serving the parole portion of that sentence commits another crime. Based on the foregoing, the Court found that Defendant's history and character and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision were warranted to best serve the public interest.

Accordingly, in light of Defendant's utter disregard for the law and his anti-social and criminal behavior, this Court found that a persistent felony offender sentence should be imposed and sentenced Defendant to an indeterminate sentence of eighteen years to life in prison.

HON. JOHN G. INGRAM
Justice of the Supreme Court

Dated: July 1, 2005
Brooklyn, New York

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE QUINONES, Defendant

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM, PART 21

DECISION AND ORDER ON MOTION TO SENTENCE DEFENDANT AS A SECOND FELONY OFFENDER

Indictment No. 2584/04

Ingram, J.

Defendant stands convicted, after jury trial, of Burglary in the Third Degree (Penal Law § 140.20) a class "D" felony. In addition, he has two prior convictions for felony offenses. The People have requested that the Court sentence him as a Persistent Felony Offender. Defendant opposes and argues that the Court is precluded from sentencing him as such because, pursuant to Supreme Court holdings in *United States v. Booker*, 125 S. Ct. 738 (2005); *Blakely v. Washington*, 124 S. Ct. 2541 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Apprendi v. New Jersey*, 530 U.S. 466 (2002), New York's persistent felony offender statute is unconstitutional. The People have submitted papers in opposition. Based on the moving papers, the opposing papers, and the relevant case law and statutes, Defendant's motion is denied.

Discussion

Penal Law § 70.10 and Criminal Procedure Law § 400.20 govern the sentencing of a persistent felony offender and the procedures a court must employ in sentencing a defendant as such as an offender. Penal Law § 70.10 (1)(a) defines a persistent felony offender. It provides, in pertinent part, that a persistent felony offender is a person "who stands convicted of a felony after having previously been convicted of two or more felonies" (Penal Law § 70.10[1][a]). Penal Law § 70.10(2) further provides that, once a court has found that a defendant is a persistent felony offender, and if it is of the opinion that defendant's history and character and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision are warranted to best serve the public interest, it may then impose a sentence of up to life imprisonment (Penal Law § 70.10[2]). Thus, it is defendant's prior convictions which make him eligible for an enhanced sentence. Whether to actually impose a sentence of up to life imprisonment is a discretionary determination by the sentencing court based on traditional sentencing factors (CPL § 400.20[9]; *People v. Rosen*, 96 N.Y.2d 329, 335 [2001] *cert. denied* 534 U.S. 899, *People v. Farrar*, 52 N.Y.2d 302, 305-06 [1981]).

The New York State Court of Appeals ("Court of Appeals") has held that New York's persistent felony offender statute meets constitutional standards and comports with the U.S. Supreme Court's ("Supreme Court") reasoning in *Apprendi* (*People v. Rosen*, 96 N.Y.2d 329; *cert. denied* 534 U.S. 899 [2001]). This Court is bound by the Court of

Appeals' decision. Moreover, as discussed below, this Court finds, contrary to Defendant's contentions, that New York's persistent felony statute comports with recent Supreme Court cases and meets constitutional standards. Furthermore, recent decisions of federal courts and other state courts which may have disagreed with the Court of Appeals' holding in *People v. Rosen* are not binding on this Court (*In re Mason*, 100 N.Y.2d 56, 58 [2003]; *People v. Kan*, 78 N.Y.2d 54, 59-60 [1991]).

New York's sentencing statute regarding persistent felony offenders complies with the reasoning in recent Supreme Court cases. In *New Jersey v. Apprendi*, 540 U.S. 466 (2000), Supreme Court held that a state sentencing statute which permitted a state court to impose an enhanced sentence beyond the statutory maximum for the crime if it found, by a preponderance of the evidence, that the crime was a hate crime, was unconstitutional. In that case, defendant Apprendi was convicted of a firearm count which carried a 5-to-10 year sentence. However, at sentencing, the trial court found that defendant violated the state sentencing law for bia crimes because he carried out his crime with racial hatred. Pursuant to that statute, it sentenced him to an enhanced sentence of 20 years. Supreme Court found that although New Jersey had named the hate crime a "sentence enhancement," it actually was a separate criminal act (*New Jersey v. Apprendi*, 540 U.S. at 478). It held that the finding as to whether defendant acted with racial hatred when he committed the crime must be proved beyond a reasonable doubt and determined by a jury. However, it specifically held that a prior conviction may increase the penalty for a crime

beyond the prescribed statutory maximum (*New Jersey v. Apprendi* at 490).

In *Ring v. Arizona*, 536 U.S. 584 (2002), Supreme Court reaffirmed its holding in *Apprendi*. In that case, defendant Ring was convicted of felony-murder during the course of robbery. Felony-murder carried a sentence of life imprisonment. Pursuant to the state sentencing laws, if the court determined that one or more aggravating factors existed, then it could sentence defendant to death. The sentencing court found an aggravating factor, that defendant was motivated by "pecuniary gain" when he committed the crime, must be proved beyond a reasonable doubt and determined by a jury (*Ring v. Arizona*, 536 U.S. at 605).

In *Blakely v. Washington*, 124 S. Ct. 2541 (2004), defendant Blakely was convicted of kidnaping, which carried a sentence of up to 10 years. The state sentencing provisions mandated a sentence of 49-to-53 months, unless the judge found aggravating factors to enhance the sentence. At sentencing, the court found that defendant carried out his crime with "deliberate cruelty" and sentenced him, as mandated by the state's sentencing guidelines, to 90 months (*Blakely v. Arizona*, 124 S. Ct. at 2534). The Supreme Court found that the finding as to whether defendant acted with "deliberate cruelty" when he committed the crime must be proved beyond a reasonable doubt and determined by the jury before the court may impose an enhanced sentence based on this factor (*Blakely v. Washington*, 124 S. Ct. at 2537).

Thus , in *Apprendi*, *Ring*, and *Blakely*, the Supreme Court found that the sentencing provisions

had added another element to the crime for which defendant had been convicted. Whether a defendant acted with racial hatred, or with deliberate cruelty, or for pecuniary gain, constituted an element of the crime. Therefore, each factor should have been decided by a jury beyond a reasonable doubt, and not by the court by a preponderance of the evidence. In other words, a factual determination regarding the commission of the crime for which defendant has not been convicted, but which serves as the basis for an enhanced sentence, must be determined by a jury beyond a reasonable doubt.

Pursuant to New York's persistent felony offender statute, this Court will not make additional factual determinations regarding the crime for which Defendant was convicted. Rather, Defendant, by his prior convictions, is eligible to be sentenced within the range of a persistent felony offender. Whether the Court will impose such a sentence is an exercise of broad discretion based on traditional sentencing factors such as the character and background of defendant, the nature and circumstances of his conduct, and the interest of the public (Penal Law § 70.10[2]). Thus, the New York sentencing statute regarding a persistent felony offender does not violate Supreme Court holdings in *Apprendi*, *Ring*, and *Blakely*.

The New York statute does not violate the Supreme Court holding in *Booker v. Washington*, 125 S. Ct. 738 (2005). In *Booker*, the Supreme Court reached the issue as to whether the federal sentencing guidelines ("Guidelines") were constitutional. Booker had been convicted by a jury of possessing at least 50 grams of crack based on

evidence that he had 92.5 grams of crack in his duffel bag. For this crime, under the facts therein, the Guidelines specified a sentence of 210-262 months. However, the sentencing court determined that Booker possessed 566 grams of crack, in addition to the 92.5 in the duffle bag. Based on this judicial determination, the Guidelines mandated that the sentencing court impose a sentence of 360 months.

In *Booker*, the Supreme Court reaffirmed its *Apprendi* holding that any fact which is necessary to support a sentence exceeding the maximum authorized by the facts established by the jury's verdict or by defendant's guilty plea, must be determined by the jury beyond a reasonable doubt (*United States v. Booker*, 125 S. Ct. 738, 756). The Supreme Court also reaffirmed its *Apprendi* holding that recidivism may enhance a sentence (*United States v. Booker*, 125 S. Ct. at 756). The Court found that, because of the mandatory nature of the federal sentencing Guidelines, and the virtual impossibility of any departure from those specific provisions in sentencing, the Guidelines have the same force and effect of an element of a crime. Therefore, it found that an additional factor in determining sentence must be found by a jury beyond a reasonable doubt. However, the Court stated that if the Guidelines were merely "advisory provisions that recommend[ed], rather than require[d], the selections of particular sentence in response to differing sets of facts, their use would not implicate the Sixth Amendment" (*Booker v. Washington*, 125 S. Ct. at 750). The entire Court agreed that there would not be a constitutional issue if Congress had omitted the provisions that make the sentencing guidelines binding on the judges (*United States v. Booker*, 125 S.

Ct. 750). Moreover, it reaffirmed "the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range" (*Booker v. Washington*, 125 S. Ct. at 750); to *Apprendi v. New Jersey*, 530 U.S. at 481; *Williams v. New York*, 337 U.S. 241, 246 ([1949]), and specifically found that when a trial judge exercises his/her discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant (*United States v. Booker*, 125 S. Ct. 750). Thus, the Supreme Court in *Booker* found that it was constitutional for a sentencing court to make a judicial fact-finding as an aid to sentencing, so long as that fact-finding is discretionary and not mandatory.

Applying these legal principles to this case, the New York persistent felony offender statute is constitutional. First, as discussed above, Defendant's prior convictions are the basis for imposing an enhanced sentence under New York's statute. The Supreme Court has held that a defendant's recidivism may enhance a sentence (*United States v. Booker*, 125 S. Ct. at 756; *New Jersey v. Apprendi* at 490). Moreover, the statute does not mandate that the court impose a persistent felony sentence. Rather, it grants the court with discretion to impose such a sentence based on traditional sentencing considerations. The Supreme Court also has held that a discretionary component of a sentence need not be determined by a jury beyond a reasonable doubt (*United States v. Booker*, 125 S. Ct. 750). Thus, the New York State persistent felony offender statute comports with recently established Supreme Court reasoning and precedent.

Based on the foregoing, Defendant's motion is denied in its entirety.

This opinion constitutes the Decision and Order of the Court.

Dated: April 15, 2005

Brooklyn, New York.

HON. JOHN G. INGRAM

Justice of the Supreme Court